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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
MARC SOBEL)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

JUL - 2 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT DOCKET No. 97-56

To: The Commission

**REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION**

Marc D. Sobel ("Sobel"), by his attorney and pursuant to Section 405 of the Communications Act of 1934, 47 U.S.C. § 405, as amended, and Section 1.106(h) of the Commission's Rules and Regulations, 47 C.F.R. § 1.106(h), replies to the *Enforcement Bureau's Opposition to Petition for Reconsideration* ("EB Opposition") filed in the above-captioned proceeding on June 20, 2002.

The Bureau argues that no new matter has been presented and that the Commission previously addressed this matter in the Kay proceeding. *EB Opposition* at ¶ 2. But in its rejection of Kay's *Petition for Extraordinary Relief* in WT Docket No. 94-147 the Commission did not address the substance of the documented and fully supported factual allegations regarding blatant misconduct by the Wireless Telecommunications Bureau. Kay had asked that the Commission defer initiating of the license revocation proceedings against him pending investigation of the matters raised in Sobel's *Request for Inquiry and Investigation* ("RRFIP"). The Commission denied this procedural relief, but it did not rule on the underlying merits of the allegations.

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Rather, the Commission stated: “The merits of the issues concerning Kay will be fully explored in the evidentiary hearing, after which the ALJ and the Commission will take whatever action is appropriate.” *James A. Kay, Jr.*, 13 FCC Rcd 16369 at ¶ 16 (1998).

In what can only be characterized as an arrogant disregard for this clear statement of intention by the Commission, however, the Wireless Bureau raised objections and obstacles to every single attempt by Kay to address these matters in the hearing proceeding, contending that they were irrelevant and that Kay’s attempts to adjudicate them were improper. As a result, neither the presiding judge during the Kay hearing, nor the Commission before or after the hearing, has ever squarely faced the substance of the allegations. Whether or not it was improper for the Commission to consider these matters in the context of the Kay revocation proceeding, or at least that it was within the Commission’s discretion not to do so, the plain fact of the matter is that the substance of the allegations was never addressed.

The Bureau next asserts that Sobel’s contention that the allegations remain unanswered is belied by the Wireless Bureau’s “extensive opposition to Sobel’s [*RRFI*], which dealt exhaustively with the allegations contained therein,” and by its “participa[tion] in the resolution of Kay’s Petition for Extraordinary Relief.” *EB Opposition* at ¶ 3. But it is the Bureau, not Sobel, that is misstating the facts. That the Wireless Bureau filed opposing pleadings to both Sobel’s *RRFI*¹ and to Kay’s *Petition for Extraordinary Relief* is not disputed. But the contention that such filings constituted in any sense whatsoever a substantive answer to the allegations is at best self-serving fantasy and at worst intentional misrepresentation of material

¹ See *Wireless Telecommunications Bureau’s Opposition to Revised Request for Inquiry and Investigation* (“*WTB Opposition*”) filed on March 13, 1998. That the Wireless Bureau filing neither denied nor refuted the facts alleged is demonstrated in detail by Sobel’s March 23, 1998, *Reply to Opposition*.

fact.² The *RRFII* consisted of a detailed 55 page pleading supported by over 300 pages of supporting materials, consisting of sworn affidavits, transcripts of testimony given under oath, and conclusive documentary evidence. No matter how extensive the Wireless Bureau's opposition or active its participation, it never even denied most of the factual allegations, and did not offer any evidence to contradict any of them.

Consider the following incomplete list of examples:

- In response to the conclusively demonstrated fact that the Wireless Bureau untimely reinstated the canceled and purged authorization of one of Kay's competitors after having received ex parte communications regarding the matter, *RRFII* at ¶¶ 26-31, the best the Bureau could muster was the totally irrelevant observation that the competitor in question was not on the list of potential witnesses against Kay. *WTB Opposition* at ¶ 20. And while the Bureau labeled as "sheer speculation" the allegation of improper ex parte influence, such denial constitutes little more than hyperbole and does nothing to negate the supporting documents provided by Sobel.³
- Sobel also presented fully documented and irrefutable evidence that Harold Pick and his father, Gerard Pick, both competitors of Sobel and Kay, presented perjured statements and falsified documents to the Commission in challenging a finders preference request filed by Sobel. *RRFII* ¶¶ 32-36. The Bureau did not challenge the accuracy of the Sobel allegation—nor could it—but instead offered the ludicrous excuse that it was somehow prevented from addressing the matter because of the designation of the Sobel revocation proceedings. *WTB Opp.* At ¶ 21. We are left to speculate as to: (a) how it is that the initiation of the Sobel case in February of 1997

² Indeed, if it is now the Bureau's position that the mere submission of a responsive paper, regardless of its substantive content, is to be deemed not only responsive but "extensively" so—even to the extent that all further consideration of the matter is forever foreclosed simply by such submission, regardless of its substantive content—then it is incumbent upon the Bureau at once to seek the reopening of the record in WT Docket No. 94-174 to report to the Commission its concession that Kay fully and "extensively responded to" and "fully participated in" the Section 308(b) request, regardless of the substantive content of Kay's responsive submissions.

prevented the Bureau from addressing documented and un-refuted evidence of misrepresentation and falsification of documents presented to it in October of 1995; and (b) why it is that the Bureau would, regardless of its view of Sobel's qualifications, simply ignore such compelling evidence of fraud on the Commission by the Picks. Sobel suggested, of course, that the Pick's were given a pass because of their perceived usefulness to certain members of the Bureau staff's lust to severely sanction Kay. The Bureau has shared no alternative explanation.

- The Bureau similarly has never explained its unwillingness to take appropriate enforcement action against James Doering, another enemy of Kay and Sobel, who made misrepresentations to the Commission and falsified certifications in an assignment of license application. Although Doering never denied, and certainly did not refute, these allegations, the Bureau turned a blind eye, apparently willing to allow him to be unjustly enriched by Nextel for his malfeasance. *RRFII* at ¶¶ 37-40.
- Another Sobel/Kay competitor, Mr. Charles F. Barnett, admitted, under oath, that he had permanently abandoned a land mobile authorization, thereby rendering it automatically canceled, but the Bureau ignored repeated requests by Sobel that the license be purged from the database. The Bureau knew its refusal to address the matter adversely affected Sobel and allowed Barnett to negotiate for the potential sale of the dead license to Nextel,⁴ but the Bureau did nothing. *RRFII* at ¶¶ 41-42.
- This same Mr. Barnett also testified under oath that he had lied to Commission staff, making false accusations against Kay, in the hope of influencing favorable action on his behalf. *RRFII* at ¶ 43. The Wireless Bureau does not deny this, yet it has never sanctioned Barnett.

³ Equally laughable as well as utterly disingenuous was the Wireless Bureau's assertion that the matter is moot because the competitor's licenses were eventually deleted more than two years later. See Sobel Reply at ¶ 34.

⁴ The Bureau is or should be aware that a licensee does not need to assign a license to Nextel in order to benefit financially. Nextel often pays incumbent licensees to surrender authorizations for cancellation—a financial transaction that does not require disclosure to or approval by the Commission—in order to clear channels of encumbrances.

- Conclusive evidence was presented to the Bureau that Mr. Christopher Killian, another Sobel/Kay competitor, had surreptitiously set up his spouse as a sham applicant to acquire authorizations that he was not eligible to hold in his own name, taking particular steps to conceal this fact from the Commission, and then later selling the authorizations to Nextel. *RRFII* at ¶¶ 44-52. Mr. Killian has never come forward even to deny, much less refute, this fully documented charge, yet the Bureau has never taken appropriate enforcement action. The Bureau does not and can not deny this fact.
- The Bureau obtained from and assisted Mr. Harold Pick in swearing an accusatory affidavit that it used in pursuing its revocation case against Kay. In the affidavit, Pick accused Kay of having stolen some repeater equipment, even though Mr. Pick knew full well that another individual had already been convicted of the crime. Not only did the Bureau accept this allegation by a known enemy of Kay, it ignored the fact that Pick had earlier written to the Bureau accusing a different individual of the crime. *RRFII* at ¶¶ 77-84. The Bureau has never explained such demonstration of incompetence or intentional prejudice in its pursuit of false accusations against Mr. Kay.
- Mr. Riley W. Hollingsworth, then a member of the Wireless Bureau staff, coached Mr. Richard L. Lewis to make an affidavit accusing Kay of (a) intentional interference with the Fullerton School District, (b) improperly and clandestinely converting the School District's license from license class GP to GB, and (c) improperly and clandestinely converting the School District's license from a community repeater to an SMR end user license. Hollingsworth then used this affidavit in pursuing the case against Mr. Kay. But when Mr. Lewis was examined under oath, it turns out that the allegations were entirely false. First, Kay was engaged to attempt to resolve the alleged interference. He had nothing whatsoever to do with the conversion of the license from a GP to a GB, even though that change was a proper correction of the license. Moreover, the conversion of the authorization from a community repeater to an SMR end user license was part of an above-board, arm's length transaction whereby the School District's technical problems were resolved. Prior to being approached by Mr. Hollingsworth, Mr. Lewis had no grievance against

nor dissatisfaction with Kay. In fact, he testified that he does not believe Kay did anything wrong. Moreover, even after having sworn to the affidavit written for him by Mr. Hollingsworth, it is clear from Lewis's testimony that he does not even understand the accusations, much less believe them to be true. Mr. Hollingsworth, on the other hand, knew or should have known that the accusations were groundless. He nonetheless suborned the false statement from Mr. Lewis and used it against Kay.

¶¶ 85-99. The Bureau did not deny any of this; rather, it sought to sweep it all under the rug merely because it did not call Lewis as a witness against Kay. *WTB*

Opposition at ¶ 40. Even assuming that justified not considering the matter in the context of the revocation proceeding, it does not excuse the Commission's failure to address such blatant and potentially illegal conduct by its staff.

- Finally, during the hearing in WT Docket No. 94-147, the Bureau declined the opportunities presented to it to offer evidence contradicting (a) Hollingsworth's insistence on 50 copies of Kay's response when Kay took steps to prevent the Bureau from copying and distributing the information to Kay's competitors, *RRFII* at ¶¶ 59-60; or (b) Wireless Bureau staff member Anne Marie Wypijewski's irregular and ex parte conduct in connection with Kay's finders preference request in the Thompson Tree matter, *RRFII* at 62-68. To be sure, the Bureau has argued the relevance of these matters to the revocation proceedings, but it has never denied, much less refuted, that the facts are as Sobel presents them. And those facts call for investigation.

To summarize, the issue here is not whether these matters should have been addressed in the license revocation proceedings. The issue is the Commission's failure to consider them at all—the Commission's failure to address the un-refuted, and in most instances un-denied, factual assertions in the Revised Request for Inquiry that was submitted entirely outside the procedural framework of either WT Docket No. 94-147 or WT Docket No. 97-56. Even if one were to assume that Sobel and Kay are "guilty as charged," which they are not, it is inconceivable and

improper that the Commission should simply ignore such fully documented, un-denied, and un-refuted evidence of blatant, clearly improper, and potentially illegal conduct by its own staff.

Respectfully submitted July 2, 2002:

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By: 

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Certificate of Service

I, Robert J. Keller, counsel for Marc D. Sobel, hereby certify that on this 7th day of June, 2002, I caused copies of the foregoing **LIMITED PETITION FOR RECONSIDERATION** to be served, by U.S. mail, to the following:

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